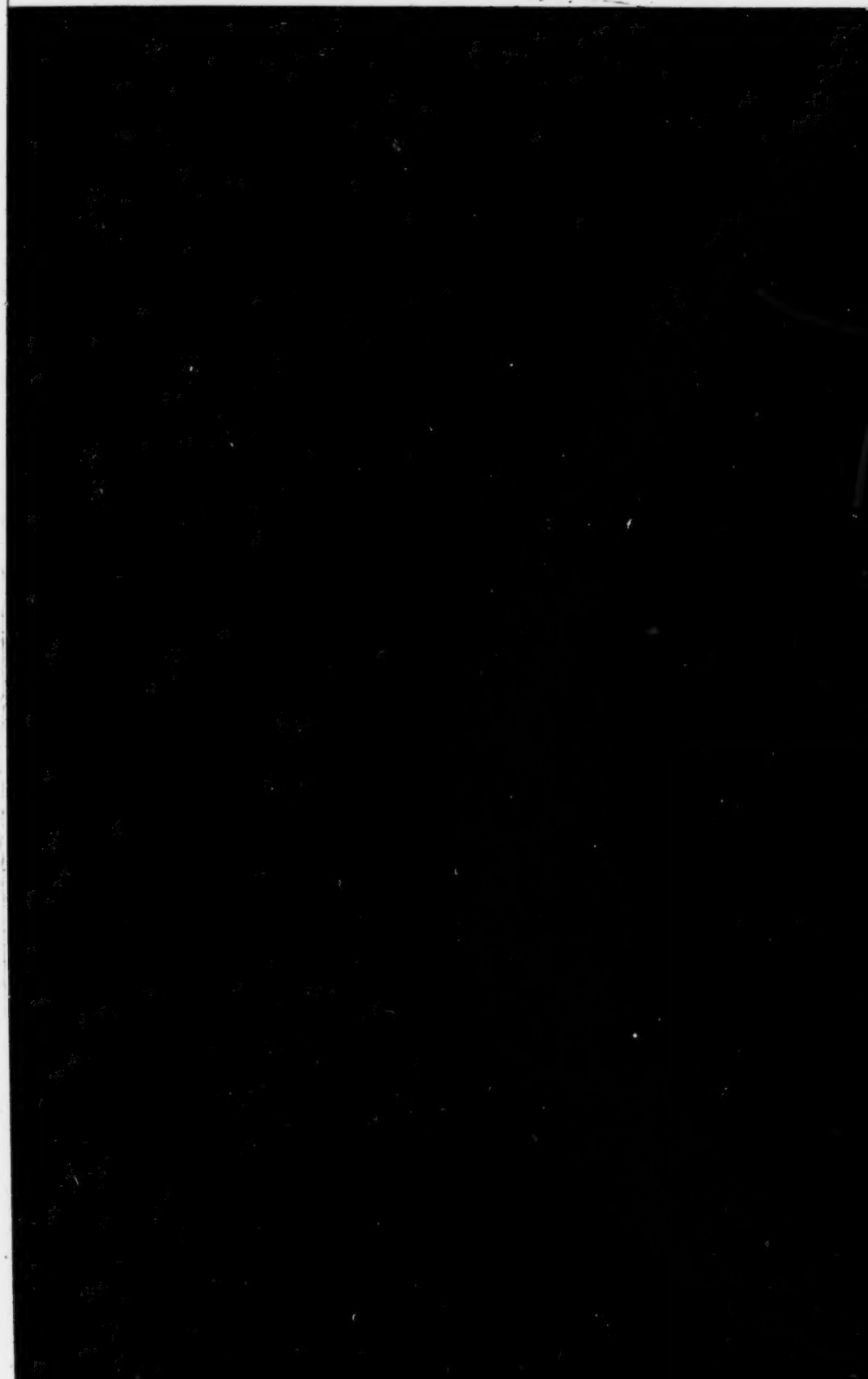

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WHITEHOUSE TRUCKING, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16 1(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A., 261 F. Supp. 9) dismissing appellant's action brought to set aside an order of the Interstate Commerce Commission (J.S. App. B., 99 M.C.C. 621).

Appellant, a motor common carrier, is authorized

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by its certificate of public convenience and necessity[1] to transport "prefabricated houses and buildings, prefabricated house and building sections, [and] prefabricated house and building panels, with parts and accessories," between points in 18 States (J.S. App. A., 2a). In 1964, the Commission, on its own motion, instituted an investigation to determine whether appellant was operating outside the scope of its authority (J.S. App. A., 1a). Appellant stipulated that it had transported some 41 shipments of general building materials (*e.g.*, insulation, pipe and wallboard), but offered no evidence that they were intended for use in prefabricated buildings (J.S. App. B., 8a). Appellant's president testified to his view that appellant could transport commodities such as nails whenever they were intended for use in any building, without restriction to prefabricated buildings (Transcript of record, p. 69). The Commission, overruling its examiner,[2] found that the certificate, when read as a whole, clearly limited appellant to transporting commodities intended for use in a prefabricated house or building and that appellant's interpretation was not only contrary to the "functions and usage of trans-

[1] The certificate was initially issued (under Section 207 of the Interstate Commerce Act, 49 U.S.C. 307) in 1947 to appellant's predecessor (J.S. App. B., 15a, n.). After the Commission's approval of the purchase of this certificate by appellant, it was reissued to appellant, on January 25, 1963 (J.S. App. B., 3a).

[2] The Commission's hearing examiner found that appellant's certificate permitted transportation of prefabricated parts and accessories whether or not they were intended to be used in prefabricated houses.

portation terminology" but was tantamount to a claim that it was authorized to transport "building materials" (J.S. App. B., 11a)—contrary to the long-standing administrative distinction between "prefabricated building" authority and "building material" authority (J.S. App. B., 12a–14a).[3]

The three-judge district court sustained the Commission in a *per curiam* decision (J.S. App. A., 3a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court, upon a careful examination of the administrative record, correctly held that the Commission's interpretation of the commodity description in the particular certificate of public convenience and necessity was reasonable and not an abuse of discretion (J.S. App. A., 3a). The interpretation of a certificate issued by the Commission is primarily a question for that agency, *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171, and unless its interpretation is clearly erroneous it is binding on the courts. *Nelson, Inc.* v. *United States,* 355 U.S. 554. As the district court held (J.S. App. A., 3a,), the Commission's "expertise [in construing its own certificates] is formi-

[3] The Commission also observed that the original application of appellant's predecessor had been supported only by prefabricated house and building manufacturers (J.S. App. B., 15a) and that appellant's predecessor had transported the commodities in question only when they were intended for use in prefabricated houses and buildings (J.S. App. A., 3a, App. B., 16a).

dable and cannot be lightly regarded by the reviewing courts."

Contrary to appellant's contention (J.S. 5), the Commission did not diminish appellant's authority by application of a "subsequently adopted policy" of creating a new commodity description of "building materials" after appellant's predecessor received the certificate. The Commission's long-standing distinction between "building material" authority and "prefabricated building" authority predated by many years the issuance in 1947 of appellant's certificate. Indeed, "building material" authority has been granted since the inception of motor carrier regulation. Cf. *William McDade Interpretation of Certificate,* 53 M.C.C. 401, construing, as pertinent, "building materials" authority granted in 1941. *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209, did not announce the policy for the first time in 1952, as appellant contends (J.S. 5); it merely restated the preexisting rule. Finally, we stress, the "intended-use" test that the Commission applied to appellant's certificate has been upheld by this Court. *Nelson, Inc.* v. *United States, supra.* Its application to the present certificate merely continued the long-standing distinction between "building material" and "prefabricated house" authority.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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